Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

(7)

NO. 88-488

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

BARRY L. RIDER, et al.,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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28 pp

QUESTION PRESENTED

Whether, in accordance with full faith and credit, the Court of Appeals properly affirmed dismissal of petitioners' Title VII sex discrimination claim where the judgment in a related state court action operated to preclude that claim under state law?

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STATEMENT OF THE CASE

1. This action arises out of alleged sex discrimination in the operation of one of Pennsylvania's state prisons. The petitioners are a group of male guards who work at the State Correctional Institution at Muncy, a prison that houses mostly female inmates. The petitioners complain that certain jobs at the prison are available only to female guards, allegedly in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e-2000e-16 (1981 & Supp. 1988). Their complaint seeks damages and injunctive relief which would permit them to be hired for the positions in question.

2. The guards first contested the prison's hiring policy in a union arbitration proceeding that was appealed to the state appellate courts. See Commonwealth, Department of Corrections

v. AFSCME, 101 Pa. Commw. Ct. 121, 515 A.2d 1000 (1986), allocatur denied, 515 Pa. 610, 529 A.2d 1083 (1987). In state court, they claimed that the sex-designated hiring policy at the prison violated two specific provisions of their bargaining agreement: one which required that all positions at the prison were to be filled strictly on the basis of seniority unless there was an operational necessity to depart therefrom;[1] and another which expressly

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[1]This contract provision provided that:

> In making shift assignments to shift openings, preference shall be granted on a seniority basis unless the Employer feels it is necessary to assign otherwise in order to protect the efficiency of operation. Seniority status in this regard shall be Classification seniority attained at the work site.

(App. 78a-79a).

prohibited discrimination based on gender.[2] (App. 78a-79a).

It was undisputed in the arbitration proceeding that the operational policy at the prison for deploying personnel required that:

> Guards will not be assigned to work in open view of unclothed inmates of the opposite sex; . . .
>
> External escort of prisoners must be by at least one officer of the same sex; . . .

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[2]The contract stated that:

> Both the Employer and the Union agree not to discriminate against any employee on the basis of race, creed, color, ancestry, sex, marital status, age, national origin, non-job related handicap or disability, union membership or political affiliation.

(App. 79a).

> Assignments to housing units will involve at least one officer of the same sex as the inmates; and . . .
>
> Guards will not conduct strip or frisk searches of inmates of the opposite sex except in case of emergency.

(App. at 81a).

The arbitrator who considered the grievances upheld them and made an award to the guards. (App. 78a). That decision, however, was appealed to the Commonwealth Court of Pennsylvania which rejected and vacated the arbitrator's ruling. In so doing, that court explained that it was the arbitrator's responsibility to decide if the sex-designated hiring practice was at odds with the essence of the contract. It pointed out that, although the arbitrator had correctly recognized that the essential inquiry was whether gender was

a bona fide occupational qualification ("BFOQ") for the positions governed by the hiring procedures, in reaching his decision, he incorrectly limited his analysis to a discussion of whether inmates retain any personal privacy right which would necessitate assignment of personnel based on gender. (App. 82a-90a).

Commonwealth Court concluded much more was involved in making the BFOQ determination in this instance. It stressed that, under state law, the prison has a legal responsibility as a public agency to deal with its inmate population in an effective, efficient, and humane manner. (App. 87a). Sex-based hiring for the positions in question, it found, was necessary from an operational standpoint in order to satisfy those obligations. Consistent with that determination, it found no

violation of the collective bargaining agreement provision on seniority-based hiring or the provision prohibiting discrimination in hiring based on gender. (App. 85a-90a). The Pennsylvania Supreme Court refused review. See 515 Pa. 610, 529 A.2d 1083 (1987).

3. Shortly after the arbitrator's award was overturned, petitioners instituted this action in this District Court for the Middle District of Pennsylvania against respondents, two Commonwealth agencies, the Pennsylvania Department of Corrections and the State Civil Service Commission, and four of their officials and employees.[3] In

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[3]The individual respondents are Glen R. Jeffes, former Commissioner of the Department of Correction; Ann M. Goolsby and J. L. Andrews Superintendent and Personnel Director at SCI-Muncy; and John E. Millett, Executive Director of the State Civil Service Commission.

their complaint they claimed that the gender-specific hiring policy used by the Department at the prison with approval of the State Civil Service Commission adversely affected their compensation and advancement and constituted impermissible discrimination based on gender prohibited by Title VII.[4] (App. 1a-3a).

Based on the decision in state court, respondents moved to dismiss the complaint. They contended that, when the state court decision was given full faith and credit in the action in federal court, it operated to bar the guards' Title VII claim. The District Court agreed and dismissed the claim. (App. 64a-76a).

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[4]The guards also sought relief under the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d)(1978); under 42 U.S.C. §§ 1983 and 1985 (1981); and under state law. (App. 3a). These claims are not involved here.

In taking that action, the District Court applied the principles the Court has prescribed in interpreting the provisions of the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1966). (App. 170a-71a). It first assessed what, if any, preclusive effect the Commonwealth Court's decision would have in the Pennsylvania courts. In this regard, it recognized that Pennsylvania law requires four conditions be met in order for a judgment in one case to preclude litigation of an issue or a claim in another: (1) that the issue decided in the prior action be identical to that in the later matter; (2) that there was a final judgment on the merits; (3) that the party against whom estoppel is asserted must have been a party to, or in privity with, a party to the earlier action; and (4) that the party

against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the earlier action. App. 71a, citing Safeguard Mutual Ins. Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975).

As the District Court observed, the guards did not dispute satisfaction of the first, third, and fourth conditions in this case. Rather, their only argument was that the judgment in state court did not decide the merits of their claim. (App. 71a-72a). The District Court rejected that contention. It concluded that the issue pivotal to the guards' Title VII claim, i.e., whether there was a BFOQ for the hiring practice, was necessarily decided in the state court proceeding given the particular contract provisions involved. Since

the effect of the contract involved was to prohibit sex-based hiring, unless there existed an operational necessity for it, the state court's conclusion that there was no violation of the contract necessarily involved a finding that there was a BFOQ for the hiring practice challenged. (App. 72a-75a).

4. The guards appealed the District Court's dismissal of their Title VII claim to the Court of Appeals which affirmed.[5] In the Court of Appeals,

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[5]Pursuant to Fed. R.Civ.P. 54(b), the District Court reduced its decision on the Title VII claim to a final judgment, (App. 58a- 63a), and the guards then appealed the disposition of that claim to the Court of Appeals. (App. 4a n. 1). The other claims are presently stayed.

they attempted to dispute the existence of all four of the state law prerequisites for preclusion, notwithstanding their failure to do so before the District Court. The Court of Appeals concluded, however, that they had abandoned their dispute as to all but the second of the requirements. (App. 30a-32a). The Court of Appeals went on to say that, even though it was under no obligation to do so, in an exercise of caution it would nonetheless review compliance with each of the four state law requirements in this case. That review concluded all were met. (App. 32a-42a).

With respect to the question of whether there had been a final judgment on the merits--the only point the guards properly disputed on appeal--the Court

of Appeals was in complete agreement with the District Court. It concluded that the state court's interpretation of the specific bargaining agreement provisions necessarily entailed addressing the issue pivotal to the guards' Title VII claim: whether there was a BFOQ for the gender-designated hiring practice. Like the District Court, the Court of Appeals also concluded that, in an action in the courts of the Commonwealth, the guards would be barred from relitigating this issue. (App. 40a-47a). Accordingly, under the principles of full faith and credit, it determined they are barred from relitigating the same issue in federal court.

ARGUMENT

THE COURT OF APPEALS' DECISION AFFIRMING DISMISSAL OF THE GUARDS' TITLE VII CLAIM PRESENTS NEITHER IMPORTANT NOR WIDELY-APPLICABLE QUESTIONS OF FEDERAL LAW MERITING THE COURT'S REVIEW.

Petitioners assert that this case presents important and far-reaching questions of federal employment law which urgently require the Court's attention. They argue, first, that in affording the state court decision preclusive effect, the Court of Appeals seriously deviated from the Court's decisions applying principles of full faith and credit. Second, they claim it was improper for the Court of Appeals to conclude that the issue central to their Title VII claim--whether a BFOQ existed for the sex-designated hiring policy--

had been decided in the state court action, because the scrutiny given that question in the arbitration proceeding was less exacting than that ordinarily employed by a federal court in resolving the same point.

In reality, none of this is true. Despite petitioners' efforts to portray it as otherwise, this is a completely unremarkable case involving nothing more than the application of well-established legal principles to the particular facts involved here. The Court of Appeals' decision has no broad significance. Moreover, what petitioners are now trying to pass off as pressing federal questions are, in actuality, issues of state law which they are barred from raising as the result of their earlier actions in this case.

A. This Court repeatedly has held that under 28 U.S.C. § 1738, the judgments of state courts are entitled to full faith and credit in federal court; they must be given the same force and effect as they would have in a state court proceeding. See McDonald v. City of West Branch, 466 U.S. 284, 287 (1984), Migra v. Warren City School District Board of Education, 465 U.S. 75, 81 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 466 (1982). The Court has never said that the applicability of this statute is restricted to particular types of state court actions. Rather, when a court is confronted with a question of what effect a state court decision may have in a matter before it, it must assay what the effect would be under state law. See McDonald, 466 U.S. at 287. As Kremer clearly shows, the

very same analysis applies when the state court decision involves a review of administrative proceedings and it may be found that the state court decision precludes a federal Title VII suit. Kremer, 456 U.S. at 476-482.

The courts below did precisely what they were supposed to do in this case. The uniform conclusion of both the District Court and the Court of Appeals on the question of state law--and, hence, one this Court should be reluctant to disturb, see Frisby v. Schultz, No. 87-168 (June 27, 1988), slip op. at 6-7; Virginia v. American Booksellers Association, Inc., 86-1034 (January 25, 1988), slip op. at 10-11; Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500 (1985)--is that petitioners' Title VII claim is precluded

because of what was necessarily determined in the state court. The courts below did not take any action contrary to the decisions of this Court. Rather, their decisions embrace and apply the well-settled principles of Kremer, McDonald and Migra.

Despite this, petitioners go to great lengths to try to create the impression that the Court of Appeals' decision conflicts with Kremer, supra, and with the Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Their arguments have no merit. The Court of Appeals' action was consistent with--not contrary to--Kremer. Furthermore, Alexander has no relevance to this action. In Alexander, the Court addressed what effect an unreviewed arbitrator's decision had under full faith and credit and concluded the doctrine did not apply. This case, by

contrast, involves a state court judgment which must be considered in the manner prescribed by Migra and Kremer. Alexander does not apply here and petitioners fail to see this distinction.

B. The true nature of petitioners' disagreement is one involving the application of state law. By discussing at length the procedures involved in arbitration and what they perceive as its inadequacies,[6] they are, in reality, arguing that they did not have a full and fair opportunity to litigate the issue on which their Title

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[6]In their related discussion of what transpired in the arbitration proceeding in this case, see Petition at pp. 31-32, petitioners take many liberties with the record and infuse that discussion with "facts" that are not actually of record. Respondents do not concede the accuracy of their account.

VII claim is based. This is a point, however, that they did not challenge in the District Court even though they had ample opportunity to do so. (App. 71a-72a). As the Court of Appeals correctly concluded, they could not legitimately attempt to resurrect that argument in their appeal before it and certainly they may not do so now. See Newark Morning Ledger Company v. United States, 539 F.2d 929, 932-933 (3d Cir. 1976), (App. 30a-32a).

The second argument made by petitioners, which challenges the BFOQ determination in this case, is likewise barred. Their basic contention, that the decision in the arbitration proceeding on this point did not involve analysis comparable to that which would be applied by a federal court, again, really involves a question of applying

state law. In essence, it is an argument that the issue involved in the arbitration proceeding and the Title VII claim is not the same. Petitioners, however, never disputed this point in the District Court when they were obliged to do. In any event, there is plainly no merit to the argument. As the opinions of the courts below demonstrate, given the particular contract provisions involved, the questions in both proceedings were synonymous. (App. 40a-47a, 72a-75a).

C. Finally, while petitioners strive to convince the Court that this case presents questions of broad application, their predictions in this respect are empty overstatements. The Court of Appeals has not fashioned any new or unusual rule. It simply has applied long-standing principles enunciated by the Court. To the extent the

state court decision in this case is "unusual" because of its genesis in an arbitration, that characterstic is not one of substance. As with any case involving a question of what effect is to be given a state court decision, its importance hinges on what actually was decided and what that means in terms of state law preclusion principles. See McDonald, supra. Its significance is confined to this case and this case alone. Other cases necessarily will be affected by the particulars they involve and may very well lead to different results.

In those situations where, as here, the ultimate conclusion is that a claim is precluded by a prior state court judgment, that result is not unfair. It means only that the state court decision has been given its intended effect under full faith and

credit. This Court consistently has recognized the importance of full faith and credit to our federal system of government. This case presents no reason to question those decisions or the result reached by the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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DATE: November 21, 1988